

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

CASE NO. 07-20167

09-13350

HON. LAWRENCE P. ZATKOFF

v.

THOMAS L. MERCER,

Defendant.

_____ /

OPINION AND ORDER

AT A SESSION of said Court, held in the
United States Courthouse, in the City of Port Huron,
State of Michigan, on August 13, 2012

PRESENT: HON. LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

This matter is before the Court on: (1) Defendant's Motion to Vacate Guilty Plea (Docket #71), and (2) Defendant's Motion for Bail Pending Decision on Motion to Vacate Guilty Plea (Docket #75). The Court notes that Defendant also filed two separate documents titled "Defendant's Motion for Leave of Court for Memorandum in Support to Vacate Defendant's Guilty Plea" (Docket #s 74 and 76), both of which include arguments in furtherance of his Motion to Vacate Guilty Plea. For the reasons that follow, all four motions are DENIED.

Simply put, in his motions to vacate his guilty plea, Defendant has raised the same issues and arguments he has in numerous prior filings, albeit couched in a different legal context. Specifically, as he has previously, Defendant argues that his sentence was erroneously enhanced by the Court in the following ways: (1) by attributing an incorrect amount of tax loss to Defendant, (2) by

incorrectly, and without authority, imposing restitution against Defendant when Defendant had an inability to pay such amount, (3) by assessing a one-point enhancement for committing a part of the offense less than two years after his release from imprisonment (pursuant to §4A1.1(e)), (4) by assessing a two-point enhancement for committing a part of the offense while on supervised release (pursuant to §4A1.1(d)), and (5) by assessing a one-point enhancement for an out-of-time (remote) prior conviction (pursuant to §4A1.1(c)). The Court has repeatedly, explicitly and implicitly, rejected each of these contentions, most notably in Docket #44 (the Report and Recommendation prepared by Magistrate Judge Komives with respect to Defendant's 28 U.S.C. §2255 motion) and Docket #46 (the Opinion and Order adopting said Report and Recommendation).

In his motions regarding vacating his guilty plea, Defendant asserts that his guilty plea should be vacated because his counsel was ineffective. *Relying on Missouri v. Frye*, 132 S.Ct. 1399 (2012), and *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). Defendant asserts that he “would not have plead guilty had he known of[(1)] these invalid constitutional prior conviction enhancement errors,” (2) the “incorrect amount of Tax Losses” calculated by the Court, and (3) “the Court lacking authority to order . . . restitution.” As this Court has held, however, none of the “errors” or “ineffective assistance of counsel” arguments has any merit, as every challenges Defendant has made to his sentence were unsubstantiated. Accordingly, the Court finds that there is no basis upon which a reasonable person could conclude that Defendant's counsel was ineffective or misled Defendant with respect to his decision to plead guilty.

In addition, as the motions to vacate guilty plea have been denied, the Defendant's Motion for Bail is DENIED AS MOOT because there is no pending motion before the Court that might reduce the term of Defendant's sentence or vacate his conviction.

Therefore, for the reasons set forth above:

- (1) Defendant's Motion to Vacate Guilty Plea (Docket #71) is DENIED,
- (2) Both of Defendant's Motions for Leave of Court for Memorandum in Support to Vacate Defendant's Guilty Plea (Docket #s 74 and 76) are DENIED, and
- (3) Defendant's Motion for Bail Pending Decision on Motion to Vacate Guilty Plea (Docket #75) is DENIED.

IT IS SO ORDERED.

s/Lawrence P. Zatkoff

LAWRENCE P. ZATKOFF

UNITED STATES DISTRICT JUDGE

Dated: August 13, 2012

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Order was served upon the attorneys of record by electronic or U.S. mail on August 13, 2012.

s/Marie E. Verlinde

Case Manager

(810) 984-3290